

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.2227 OF 1999.

Smt. Sheela Subhash Sali,
residing at Parth Bunglow,
behind Runanubandh Karyalaya,
New Bombay Agra Road Nasik, 422 001. .. Petitioner

V/s

1. Commissioner,
Nasik Municipal Corporation,
Rajiv Gandhi Bhuvan, Sharanpur,
Road, Nasik 422 001.
2. Anil Vithal Nikam,
R.M.O., Bytco Municipal Hospital,
Nasik Road.
3. The State of Maharashtra ..Respondents.

Shri S.G. Kundle for Petitioner

Shri V.A. Gangal for respondent No.1.

Shri G.S. Godbole with Shri S. M. Sahasrabudhe for
respondent No.2.

Shri C.R. Solnawane, AGP for respondent No.3.

**CORAM : B.H. MARLAPALLE &
J.H. BHATIA, JJ.**

DATE : 21ST NOVEMBER, 2006.

ORAL JUDGMENT (PER B.H. MARLAPALLE, J)

. This petition filed under the Articles 226 and

227 of the Constitution of India brings in question the order of promotion to the post of Resident Medical Officer (Clinic) passed in favour of respondent No.2 on 26/8/1997.

2. The petitioner was appointed by respondent No.1, Corporation (Nasik Municipal Corporation) as Medical Officer with effect from 27/6/1983 in the pay scale of Rs.. 500-20-700-EB-25-900 with other allowances as permissible and this appointment was under reservation quota, as the petitioner belongs to Scheduled Caste. The respondent No.2 came to be appointed as Medical Officer on 22/9/1983 by the respondent No.2 Municipal Corporation in the very same pay scale and under the quota of Scheduled Caste, as he also belongs to the same category. Both of them completed the qualifying service for promotion to the post of RMO when the Deputy Commissioner of Respondent No.1 Corporation by his letter dated 28/7/1994 informed the Medical Superintendent of the said Corporation to fill in, the post of RMO (Clinic) with effect from 18/4/1994. Though, this letter was not brought to the notice of the petitioner, ultimately respondent No.2 came to be promoted to the post of RMO (Clinic) and in spite of the

petitioner being the senior to respondent No.2, her claim was not considered. She claims to have submitted a representation on 28/10/1997 to the respondent No.1 with a reminder dated 27/11/1997 and there was no response. She claims to have submitted one more representation on 19/1/1998 and requested respondent No.1 to take appropriate steps for the redressal of her grievance. Ultimately, this petition has been presented before us on 20/3/1999 for a dual relief namely (a) to declare that the petitioner is promoted to the post of RMO (Clinic) with effect from 26/8/1997 with all consequential benefits and (b) to set aside the order of promotion for the said post issued in favour of respondent No.2.

3. Though the petition was admitted by this Court as per order dated 26/7/1999, the prayer for interim relief was not considered. The respondent No.1, as well as respondent No.2 have filed affidavit-in-reply opposing the petition. The respondent No.1 has also filed affidavit-in-Sur-rejoinder, as well as additional affidavit during the course of hearing of this petition. It is contended by respondent No.1, Corporation that the promotion for the post of RMO is based on the principle

of seniority-cum-merit and the said post was reserved for scheduled caste, as per the reservation roster. There were in all 4 Medical Officers i.e. the petitioner, respondent No.2, Dr. Suryavanshi and Dr. Jadhav, who were allegedly for being considered to the said post and all of them are from the scheduled caste category. The respondent No. 1 therefore, constituted a Departmental Promotion Committee headed by the Deputy Municipal Commissioner (Shri R.C. Tambat) and the said committee considered the service record of the last five years of all the four medical officers. After considering the entire record (including confidential record, service record and seniority list), the DPC found that the service record of last five years of the petitioner was ordinary. The reviewing officer had stated that the petitioner was "not fit for promotion" in the last three years Annual Confidential Reports and on the other hand, the service record of respondent No. 2 was "positively good". In these circumstances, the committee recommended the case of respondent No.2 for promotion to the post of RMO and accordingly, the impugned order for promotion was issued in his favour. He has been functioning as the RMO for the last about nine years uninterruptedly and there is no reason to

interfere with the said promotion, more so, when his service record was better than the petitioner. The respondents have also contended that this petition suffers from delays and latches and that could be an additional ground to dismiss the petition.

4. As per the service rules applicable, the post of Resident Medical Officer is required to be filled in by two modes (a) nomination and (b) by promotion. For being eligible for promotion, the following eligibility criteria have been set out in the rules:

(a) possess a decree of medicines and surgery of Indian University and

(b) having an experience at least seven years in a responsible public health post under Government or a Local Body or in similar other responsible position. Rule 6 of the respondent No.1 Corporation, framed under section 45(2), 454 r/w section 457(3)(b) of the Bombay Provincial Municipal Corporation Act, 1949 deals with the appointment by promotion and it reads as under:-

"(1) when an appointment is to be made by promotion as prescribed in the Regulations from amongst the candidates already in the service of Corporation, the Commissioner or a Municipal Officer authorised by him in this behalf, shall-

(a) subject to Regulations framed by the Corporation for qualifying written examination, prepare and forward to the Selection Committee a preliminary list of selected persons, who in his opinion, are fit for promotion to the next higher cadre or grade of officers or servants on the basis of seniority and merit;

(b) indicate the details of vacancies existing or likely to exist, and

(c) furnish a complete list of persons who in his opinion are eligible to be considered for promotion and those who are considered unfit for such promotion together with full particulars, of service including educational qualifications and other qualifications, and up-to-date confidential record of all such persons starting therein inclusion in the select list or their omission from such list, as the case may be.

(2) The Sections Committee shall, -

(a) examine the proposal submitted by the Commissioner or the officers authorised by him in this behalf,

(b) consider the claims of all the candidates in the light of their record of service and recommendations of the Commissioner or the Officer, authorised by him in this behalf,

(c) select the suitable candidate for the appointment and convey its selection to the appointing along with any directions it has to give.

(3) The Selection Committee may, for the purpose of selection of the candidate, call for such record or additional information in respect of such persons as it thinks necessary, and it

shall be the duty of the officer concerned to furnish the same without delay."

5. Accordingly, the selection Committee was constituted as noted earlier and the cases of the above mentioned 4 medical officers including the petitioner and respondent No.2 were considered. We are therefore, required to examine (a) whether the petitioner was required to be promoted to the post of RMO on the basis of seniority-cum-merit and (b) whether the promotion of respondent No.2 calls for interference. Along with the affidavit-in-reply, the ACRs of the petitioner, as well as respondent No.2 have been placed before us. The petitioner's ACRs for the years 1990-1991 to 1995-1996 and ACRs of respondent No.2 for the years 1992-93 to 1995-96 are perused. The petitioner's ACR for the year 1990-91 recorded by the Reporting Officer is "positively good" and for the year 1991-92 it is "good" and same is the assessment for the next two years ie. 1992-1993 and 1993-94. However in the year 1994-95 and 1995-96 the reporting Officer rated her as "average". In the first four years, as per the reporting Officer, the petitioner was found to be a hard working and sincere officer with good leadership and intelligence as well as good level

of technical ability and her administrative ability was found to be good and so was the remark about her integrity and character. As per the reporting officer the petitioner was fit for promotion, in the year 1991-92. Almost the same assessment appears in the ACRs written on 28/2/1994 i.e. after about two years. We have seen in the column of "Administrative ability and judgment initiative and drive" there appears to be some subsequent additions. In the ACR for 1992-93 almost the same assessment has been set out by the reporting officer except in the column of "fitness for promotion", he recorded that the petitioner was "not fit for promotion" and she was rated to be a "good officer". This remark that the petitioner was "not fit for promotion" was also set out in the Annual Confidential Reports of 1993-94, 1994-95 and 1995-96. As per the respondent this remark of the reporting officer stating that the petitioner was "not fit for promotion", was considered by the committee and the committee therefore, held that the petitioner was "not fit for promotion.

. On the other hand, the Annual Confidential Reports of the respondent No.2 for four years indicate that in the first year he was rated to be "good", in the

second year "positively good", in the third year "positively good" and in the fourth year also "positively good". The petitioner's Annual Confidential Reports for the year 1992-93 are allegedly written on 13/2/1994, whereas for the earlier years i.e. 1991-92, they are written on 28/2/1992. Admittedly all the Annual Confidential Reports were required to be confirmed by the Reviewing Officer, and as far as the petitioner is concerned, except for the last year i.e. 1994-95 and 1995-96 all other Annual Confidential Reports are blank in Part No.III, which indicates that they were not placed before the Reviewing Officer i.e. Commissioner of Respondent No.1 Corporation. As a matter of curiosity or may be otherwise, the petitioner's Annual Confidential Reports for the years 1991-92, 1992-93 were written prior to 28/7/1994 i.e. before the promotion post of R.M.O. was announced. Whereas, her Annual Confidential Reports for the period 1994-1995 was written on 28/8/1994 and she was reported to be "not fit for promotion". We have also noted that in the ACR of Respondent No.2 for the year 1992-93, the remark "not fit for promotion" does appear. This also means that he was considered more meritorious by the DPC only on the basis of the ACRs of three years i.e.

1993-94 to 1995-96 and not on the basis of the ACRs for five years.

6. We have considered the Service Rules of the Corporation and admittedly there is no Bench Mark set out for granting promotions. In the affidavit-in-reply it has been stated that the promotion has been given strictly on the basis of "seniority-cum-merit". The petitioners assessment as done by the Reporting Officer does not record any thing adverse against her integrity and character, capacity to get work done by the subordinate, industry and application, technical ability, and general intelligence and for administrative ability. In the last two years, her assessment from "good" came down to "average". Out of the six years Annual Confidential Reports, the ACRs for four years have rated her as " good or positively good" and for the last two years she has been rated as "average". The authenticity of the ACRs in the absence of same being placed before the Reviewing Officer, is questionable. Notwithstanding, these observations, we have no hesitation in holding that there is no supporting material in these ACRs on the reporting officers assessment, that she was "not fit for promotion" and

this assessment could have given more authenticity, if it was confirmed by the Reviewing Authority. It has not been done except for the last year. In addition the remark "not fit for promotion" amounts to adverse CR and the same was never communicated to the petitioner.

7. The principle of "seniority-cum-merit" has been explained by the Apex Court in number of cases. In the case of **B.V. Sivaiah and others etc.V. Addanki Babu and others** reported in AIR 1998 S.C. 2565 a three Judge Bench explains the same principles in the following words:-

"While applying the principle of seniority-cum-merit for the purpose of promotion what is required to be considered is inter se seniority of the employees who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between employees appointed on the same date and having the same length of service, it is generally determined on the basis of placement in the select list for appointment. Such determination of seniority confers certain rights and the principle of seniority-cum-merit gives effect to the such rights flowing from seniority. It cannot, therefore, be said that in the matter of promotion on the basis of seniority-cum-merit, seniority has no role where the employees eligible for promotion were appointed on the same date and have the same length of service."

We thus, arrive at the conclusion that the criterion of seniority-cum-merit in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

8. The above view was reiterated by another three Judge Bench in the case of **Union of India V. Lt. General Rejendra Singh Kadyan and another**, reported in **AIR 2000 S.C. 2513** in the following words-

"Seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."

9. Applying the above well settled legal position

to the instant case, even if the petitioner was found to be less meritorious than the respondent No.2, it was not permissible for the DPC to hold that the petitioner was unfit candidate for being promoted to the post of RMO (Clinic). Comparative merit assessment between the petitioner and the respondent No.2 was not permissible, if the promotion was on the basis of seniority-cum-merit. It appears that the DPC as well as, respondent No. 1 proceeded on the basis that promotion was to be effected on the principles of "merit-cum-seniority". We therefore, hold that the petitioner was wrongly denied the promotion to the post of RMO (Clinic) and her claim ought to have been considered instead of the candidature of respondent No.2. We must also make it clear that the respondent No.2 has been discharging duties in the higher post during the last about nine years and the Corporation has already paid him the higher pay scale. Our findings, therefore, have dual consequences namely the petitioner will not be entitled for arrears of salary as applicable to the post of RMO (Clinic) and there will not be any recovery from respondent No.2. Nevertheless, the petitioner would stand promoted notionally and entitled for fixation of her salary in the post of RMO as if she

was promoted from the original date i.e. 26/8/1997 in place of respondent No.2. In our view that recoveries cannot be made from Respondent No.2, we are supported by a recent Judgment in the case of **Purshottam Lal Das V/s the State of Bihar (JT 2006 (12) SC 581)**.

10. On the point of delay and latches, as we have noted earlier the petitioner's last representation was dated 19/1/1998 and she approached this Court after about 15 months but that by itself would not be a reason for us to dismiss this petition. More so, while admitting the petition the issue of delay was not left open. In any case, we have denied her the benefit of arrears of salary in the higher post.

11. In the premises, this petition succeeds and the same is hereby allowed partly. The promotion order issued in favour of respondent No. is hereby quashed and set aside and it is held that the petitioner was wrongly denied the promotion to the post of RMO (Clinic). The petitioner shall stand promoted to the said post notionally with effect from 26/8/1997. Her salary in the higher post shall be fixed on the basis of this notional promotion.

12. Rule made absolute accordingly with no order as to costs.

13. At this stage, the learned Counsel for the respondent No.2 submitted an oral application for stay to the operation of this order for a period of 6 weeks. The application is granted.

(J.H. BHATIA, J.)

(B.H. MARLAPALLE, J.)